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No. 83-399

# In the Supreme Court of the United States

OCTOBER TERM, 1983

PAUL LOVEDAY, ET AL., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Federal Communications Commission correctly interpreted the sponsorship identification requirements of Section 317 of the Communications Act of 1934 (47 U.S.C. 317) and the Commission's regulations to allow stations broadcasting political advertisements to accept without extensive independent investigation the plausible representations of an advertiser that it is the real sponsor.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 707 F.2d 1443. The decision of the Federal Communications Commission (Pet. App. 35a-59a) is reported at 87 F.C.C.2d 492. The ruling of the Commission's Broadcast Bureau (Pet. App. 37a-59a) is reported at 87 F.C.C.2d 493.

### JURISDICTION

The judgment of the court of appeals was entered on May 10, 1983. On August 3, 1983 Justice Brennan granted an extension of time in which to file a petition for a writ of certiorari to and including September 7, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 317(a)(1) of the Communications Act of 1934, 47 U.S.C. 317(a)(1), requires broadcast stations to identify paid political advertisements as such and also to identify the sponsor. In addition, a licensee must make a reasonably diligent effort to learn from the "persons with whom it deals directly" the identity of the true sponsor (47 U.S.C. 317(c); 47 C.F.R. 73.1212(b)). The Commission's rules further provide that where an advertisement is placed by an agent acting "on behalf of another, and such fact is known or by the exercise of reasonable diligence * * * could be known to the station" the principal, rather than the agent, must be announced as the sponsor (47 C.F.R. 73.1212(e)).[1]

2. The ballot for the November 1980 general election in California included Proposition 10, which, if approved, would have required separate smoking and no-smoking areas in public places throughout the state (Pet. App. 2a-3a). On September 26 and October 3, 1980, Richard Kalish, a representative of petitioner Californians for Smoking and No Smoking Sections (also called "Yes on 10"), a group in favor of the Proposition, wrote to all California broadcast stations concerning recently broadcast political advertisements opposing the Proposition (Pet. App. 3a-4a, 78a-83a, 85a-90a). Stations broadcasting these advertisements had identified them as paid for by Californians Against Regulatory Excess ("CARE"). Kalish claimed that the tobacco industry was concealing the extent of its financial and other

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[1] In the case of an advertisement sponsored by a political committee, the Commission's rules also require the licensee to obtain "a list of the [sponsor's] chief executive officers or members of the executive committee or of the board of directors" for inclusion in the licensee's public inspection file. If the advertisement is originated by a network, this list may be kept for public inspection at the network headquarters or in the affiliates' public files. 47 C.F.R. 73.1212(e).

involvement in the campaign against Proposition 10[2] and was using CARE as a "front" organization to purchase broadcast time for advertisements prepared by an adverstising firm hired by the industry (*id.* at 86a-87a). Kalish contended that CARE's most recent campaign financial disclosure statement revealed that the vast bulk of its funds came directly from the tobacco industry[3] and that the full extent to which tobacco money was financing broadcast advertising against Proposition 10 would become evident some 10 days before the election, when CARE made its next required filing with the California Fair Political Practices Commission (*id.* at 87a-88a). Kalish argued that broadcast stations were required under FCC rules to identify CARE's ads as "Paid for by the Tobacco Industry" (*id.* at 89a). As the court below observed (*id.* at 4a-5a), Kalish's allegations were not documented.

On October 2, 1980, David Bergland, the Chairman of the Board and President of CARE, sent all California broadcast licensees a letter (Pet. App. 91a-97a) in which he protested that it would be "inaccurate" if CARE's ads were labeled as those of the tobacco industry (*id.* at 96a). Bergland, who described himself as the National Chairman of the Libertarian Party, stated that he, the Secretary of the California Republican Party, and the president of a political campaign firm had organized CARE in the summer of 1980 for the general purpose of educating Californians

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[2]Kalish asserted that tobacco interests had provided almost all of the money for an advertising campaign to defeat a similar proposition in 1978, and he referred to a pollster's conclusion that a backlash against this industry involvement had developed in the closing days of that campaign (Pet. App. 79a, 86a).

[3]Kalish said that the small amount of CARE's funds from other sources came as a result of a direct mail campaign financed at a loss by the tobacco industry for the sole purpose of making it appear that CARE was receiving "numerous small contributions" (Pet. App. 88a).

about excess government regulation and the specific purpose of opposing Proposition 10 (*id.* at 91-92a, 96a). While not denying that most of CARE's money came from the tobacco companies, he stated that his group was actively soliciting support and contributions from numerous groups and individuals throughout California (*id.* at 93a, 95a).

Bergland said that CARE had retained staff and consultants to draft advertising copy, but he stated that the copy was carefully reviewed by CARE's legal counsel and that no one, and "certainly not * * * any contributor," had been delegated editorial control over the ads (Pet. App. 94a-95a). He also described the effort of CARE's three organizers to form a board of directors representing the "industries most affected by Proposition 10" and including "leading citizens whose presence would indicate the breadth of opposition which we planned to mobilize" (*id.* at 93a).[4] Bergland assured the licensees that CARE was not a "front" for any person or group and maintained that the advertisements at issue should be identified as "Paid for by [CARE]" (*id.* at 92a-96a).

After receiving Kalish's letter of October 13, 1980, some licensees requested and received additional information from CARE's counsel (see Pet. App. 98a-102a). Apparently all licensees continued to identify the ads as paid for by CARE.

3. "Yes on 10" did not attempt in correspondence with the licensees to reply specifically to the statements contained in Bergland's letter. Instead, petitioner Paul Loveday, the Chairman of "Yes on 10," asked the Commission

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[4]CARE's Board was said to include, among others, a past president of the American Lung Association of Los Angeles County, a Democratic California assemblyman, the former Republican State Controller, the State Director of the National Organization for Women, and the presidents of a number of California trade associations.

for an expedited ruling that under Section 317(c) of the Act, 47 U.S.C. 317(c), and 47 C.F.R. 73.1212 of the Commission's stations carrying CARE's ads must announce that they had been paid for by the tobacco industry.[5]

The Commission's Broadcast Bureau denied the requested ruling, holding that the licensees had been reasonably diligent in determining the sponsorship of the CARE advertisements (Pet. App. 37a-59a). Declining to "investigate the nature of political committee[']" advertisements (*id.* at 54a), the Bureau relied (*id.* at 50a-52a) on its earlier decision in *Voter*, 46 Rad. Reg. 2d (P&F) 350 (1979), which held that a licensee had acted reasonably in accepting a political committee's assurance that it maintained editorial control over advertisements opposing a ballot proposition. The Bureau noted that in *Voter* an opposing group had alleged that the ostensible sponsor was a "front" for a third party from whom the apparent sponsor admitted receiving substantial financial assistance (Pet. App. 50a-52a). The Bureau found no basis for requiring the stations involved in the present case to reject CARE's representations that it, and not the tobacco industry, exercised editorial control over the advertisements purchased in CARE's name (*id.* at 53a).

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[5]In addition to repeating the allegations it had made to the licensees, "Yes on 10" for the first time purported to respond directly to the Bergland letter and included factual material that had not been presented to the licensees. The court of appeals disregarded "Yes on 10's" new submissions as irrelevant to the issue of the licensees' duties as a result of the information presented to them (Pet. App. 6a). Petitioners continue to seek to buttress their case by reliance on asserted facts and contentions that were never presented to the licensees. See, *e.g.*, Pet. App. 60a-77a, 103a-110a.

The full Commission found the Bureau's decision correct and denied administrative review (Pet. App. 35a-36a).[6]

4. The court of appeals affirmed (Pet. App. 1a-34a). It noted that the Commission's interpretation of Section 317 and the agency's implementing regulations were entitled to deference (*id.* at 11a). The court found support on the face of the statute for the Commission's decision not to require licensees to go beyond the apparent sponsor's assurances and undertake an independent investigation of a complainant's allegations. The court observed (*id.* at 12a-13a) that while Section 317 refers explicitly to situations in which a putative political advertiser may not be the true sponsor (see 47 U.S.C. 317(a)(1)), the statute defines the licensee's obligation to obtain information regarding sponsorship as extending only to "persons with whom [the licensee] deals directly" (see 47 U.S.C. 317(c)).[7] The court also carefully examined the legislative history of Section 317 and found no reason to conclude that Congress desired to impose upon licensees a duty to "go behind the information it receives" from the ostensible sponsor in order "to guarantee its accuracy" (Pet. App. 13a-25a & n.18). The court added (*id.* at 29a-30a) that compelling broadcasters to act as "private detectives" to resolve conflicting allegations about the true sponsor of political advertisements carried by their

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[6]The Commission did modify the Bureau's decision to the extent that it could be read to say that "Yes on 10" had to present "conclusive" evidence of the tobacco industry's editorial control over the CARE ads before the licensees could be found to have acted unreasonably in accepting CARE's denial of such industry control (Pet. App. 35a-36a, 53a).

[7]Another provision of Section 317(c), which refers to a station's duty to obtain information from "its employees," is not in issue here. That provision applies, for example, when a record company has paid a disc jockey to play a certain record. This requirement is an outgrowth of the "payola" scandal in the late 1950s. 47 U.S.C. 317(b), 508; see also Pet. App. 19a-20a.

stations would likely impose a burden on political speech and would create an "administrative quagmire" for the Commission (*ibid.*). Before a statute is construed to have such effects, the court said, there must be "a far clearer congressional directive that stations affirmatively seek out true sponsors" (*id.* at 33a).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is not warranted.

1. Petitioners first argue that, under Section 317 and the Commission's regulations, when a political committee buys advertising time with funds contributed by others, the true sponsors are the contributors and not those who decided to purchase the broadcast time and exercised editorial control over the ads. Petitioners therefore contend that the contributors must be announced as the sponsors (Pet. 25-28).

This argument was not made to the Commission and thus may not be raised for the first time on judicial review. 47 U.S.C. 405; see, *e.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). Before the Broadcast Bureau, petitioners argued that an aggregate of facts, including the tobacco industry's funding of CARE, compelled the conclusion that the industry sponsored the ads. See, *e.g.*, Pet. App. 38a-39a. On administrative appeal to the full Commission, petitioners made this and other arguments but never maintained that mere funding of a political committee by contributors made those contributors as a matter of law the sponsors of the committee's

advertisements. See J.A. 177-178.[8] The court of appeals properly declined to review this issue. Without the benefit of a decision by that court or the administrative agency with expertise in this field, this Court should likewise deny review.

2. Petitioners also argue that Section 317(c), which requires that licensees use "reasonable diligence" to identify the sponsor of an advertisement, actually obligates them "to exercise the 'highest degree of diligence,' " and to undertake " 'arduous' investigation" (Pet. 29). Alternatively, petitioners appear to argue that under any interpretation of the reasonable diligence standard, the licensees here failed to perform their statutory duty of inquiry (Pet. 29-31). Neither argument is sound.

The Commission's position is that a licensee's duty under Section 317(c) to inquire about the identity of the sponsor of a broadcast advertisement is satisfied when the licensee obtains "facially plausible information" from the apparent sponsor (Pet. App. 11a, 24a & n.17). The court of appeals properly gave deference to the Commission's construction of its own statute and regulations (*id.* at 11a). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

The starting point for inquiry, of course, is the text of the statute. Section 317(c) provides that the licensee must obtain information regarding sponsorship from "persons with whom it deals directly." As the court of appeals observed (Pet. App. 12a-13a), this suggests that a licensee is entitled to rely on information obtained from the apparent sponsor.

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[8]Petitioners' vague assertion to the Commission that the Bureau "erred in its assumptions with respect to the meaning of 'Sponsor' and 'control' " (J.A. 177) did not fairly present to the Commission the purely legal issue now raised. *Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976).

The legislative history, which was exhaustively canvassed by the court of appeals (Pet. App. 13a-25a), supports this conclusion. Petitioners claim that the legislative history of Section 17 of the Radio Act of 1927, ch. 169, 44 Stat. 1169, the predecessor of Section 317, shows an intent "to disclose to listeners the *source* of broadcast advertising" (Pet. 34; emphasis in original). However, as the court of appeals showed (Pet. App. 13a-17a), Section 17 was meant to impose "only a very limited obligation upon broadcasters: to announce that a program had been paid for or furnished to the station by a third-party and to identify that party" (Pet. App. 17a).

Petitioners contend (Pet. 35-42) that the 1960 amendment of Section 317 incorporated the Commission's prior interpretations of that provision, which, according to petitioners, required licenses to look beyond an apparent sponsor's plausible representations regarding sponsorship. In fact, however, the Commission has never required such inquiry either by regulation or ruling.[9]

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[9]What petitioners describe as the "1944 Rule" (Pet. 35), which appears in Pet. App. 20a-21a n.15, required that a licensee disclose what it already knew about an agency relationship, but that rule did not impose any burden on a licensee to investigate whether such a relationship existed (Pet. App. 22a-23a). *Albuquerque Broadcasting Co.*, 40 F.C.C. 1 (1946), indicated that a licensee had a duty under certain circumstances to make some inquiry, but the extent of that inquiry was not specified. In particular, that decision did not say that, once a station's inquiry produced plausible information from the apparent sponsor supporting its claim to be the true sponsor, the station still had to continue the investigation. Contrary to petitioners' unsupported assertion (Pet. 38 n.12), the Commission's so-called NAM (National Association of Manufacturers) Opinions did not involve a situation in which stations had facially plausible information supporting a conclusion that the apparent source of certain broadcasts, station WTTG, was the real source. WTTG offered stations summaries of certain Senate hearings for a quoted price of $475 per program, but subsequently a known representative of the NAM told station management that the films of the hearings would be available free of charge, and the films then arrived at the station postpaid and without cost. *KSTP, Inc.*, 40 F.C.C. 12, 13-14 (1958).

In addition to the statutory language and legislative history, the court of appeals found other persuasive reasons why "[a] duty to undertake an arduous investigation ought not casually be assigned to broadcasters" (Pet. App. 11a). Petitioners do not dispute the court's conclusion that their interpretation of the statute would impose, at a minimum, a "burden, [an] expense, and [a] delay upon political speech" and could choke off altogether the broadcast of many political messages (*id.* at 29a-31a). As the court of appeals observed (*id.* at 31a), "[q]uite aside from any First Amendment difficulties that such a rule might implicate," it is unlikely that Congress intended such results.[10]

Finally, petitioners' challenge to the Commission's application of its own diligent inquiry standard (Pet. 29-31) does not warrant further consideration. The Commission twice examined the facts presented to the licensees by petitioners and CARE and found that CARE's assurances were sufficient. The court of appeals carefully re-examined the same record and found no error. There is no reason for this court to review this fact-bound question. Cf. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635-636 (1967).

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[10]As the court below observed (Pet. App. 31a n.22), information regarding the makeup and financing of groups like CARE is generally available to the public. CARE's campaign financial disclosure statements are periodically filed with the California Fair Political Practices Commission (Pet. App. 100a), and information about CARE's composition is available in the public inspection files of the California stations that carried CARE's advertisements. See p. 2 n.1, *supra.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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